

**DOCKET NO. 001-SE-0905**

**STUDENT, b/n/f Parents,  
Petitioner**

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**BEFORE A SPECIAL EDUCATION**

**v.**

**HEARING OFFICER**

**HUMBLE INDEPENDENT  
SCHOOL DISTRICT,  
Respondent**

**FOR THE STATE OF TEXAS**

**DECISION OF THE HEARING OFFICER**  
**STATEMENT OF THE CASE**

Student (Petitioner), through her next friends Parents, requested a due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, et seq., as amended. The issues for hearing were as follows:

- 1) Does Student's program provide education in the least restrictive environment (LRE) appropriate?
- 2) Did Humble Independent School District (Respondent or HISD) offer an appropriate individualized education program (IEP), with goals and objectives tailored to Student's educational needs and abilities?
- 3) Did HISD provide and implement an appropriate behavior intervention plan (BIP)?
- 4) Did HISD offer Student a free, appropriate, public education (FAPE)?

As relief, Petitioner requested IEP goals and objectives targeted to a higher academic level; placement in regular \*\*\*-grade classes for academic courses, with the assistance of a special education co-teacher and/or instructional aide; and an aide to assist her in physical education (PE) and in passing from class to class.

Held, for Respondent.

**PROCEDURAL HISTORY**

Petitioner's request for hearing was received by the Texas Commissioner of Education on September 13, 2005, and was received by the Hearing Officer on the same date. Petitioner's Complaint included a detailed set of factual allegations concerning Student's education in HISD. The school district filed a Response to Petitioner's Complaint on September 29, 2005. Petitioner was represented by Danny Barfield. Respondent was represented by Janet Horton.

Telephonic prehearing conferences were held on October 11, 2005, and November 2, 2005, and were transcribed by a court reporter. The hearing was set for November 1 and 2, 2005. Mr. Barfield began representation of Petitioner on or about October 26, 2005. Petitioner

requested a continuance to allow time for Mr. Barfield to review records and prepare for hearing. The continuance was granted, and the hearing was reset to December 6 and 7, 2005, and was held on those dates. The Decision due date was extended accordingly.

At the hearing, Petitioner objected to the testimony of Respondent's expert witness, Dr. \*\*\*, but withdrew the objection on December 13, 2005.

The Decision due date was extended by agreement of the parties to January 17, 2006, and the Decision was issued on that date.

### **FINDINGS OF FACT**

1. Student is \*\*\* years old and in \*\*\* grade in HISD. She has been diagnosed with \*\*\*, attention deficit hyperactivity disorder (ADHD), childhood disintegrative disorder, and a form of psychosis, and receives special education as a student with other health impairment (OHI). She was referred to special education in \*\*\* grade and began receiving speech services at that time. The ARDC later determined that speech services were no longer necessary and discontinued them.

2. Student attended \*\*\*, \*\*\* and \*\*\* grade, and part of \*\*\* grade in HISD. At the beginning of her \*\*\*-grade year, in September 2002, her parents withdrew her when Respondent attempted to convene a meeting of the Admission, Review, and Dismissal Committee (ARDC) to discuss placement in a special education classroom due to academic problems and disruptive behavior. She transferred to Houston ISD, where she ultimately was placed in a self-contained classroom due to inability to sit still, impulsivity, and verbal and physical aggression, including hitting other students.

3. Student returned to HISD in Fall 2004 as a \*\*\*-grader at \*\*\*. She was placed in Ms. \*\*\*'s special education applied skills classroom for all academic subjects. She made academic progress and mastered all \*\*\*-grade objectives in math, reading, writing and social studies, and most of her science objectives. She was included in regular education in PE, computer class, lunch, and recess.

4. Student currently is in \*\*\* grade at \*\*\* in HISD. She receives reading, language arts, and math instruction in resource classrooms, and science and social studies in an applied skills classroom. Student has a regular education advisory period, which is similar to homeroom, regular education choir and PE, and lunch and recess with regular education students. At the time of the hearing she was passing all classes and had made academic progress in several subjects.

5. The applied skills classroom is an academic instructional setting designed for children who are several grade levels below their peers. However, the placement determination is made by the ARDC based on multiple factors, including cognitive abilities, and not just grade level. Compared to a regular education class, the applied skills and resource settings provide a smaller student-to-teacher ratio, fewer disruptions, more one-on-one instruction, more small-group instruction, and opportunity for repetition and re-teaching.

6. Co-teach classes in HISD are designed for students who are at or near grade level, do not have discipline or work-refusal problems, have some academic gaps, and need help preparing for the Texas Assessment of Knowledge and Skills (TAKS) test.

7. Student has both a BIP and a detailed social skills IEP. Most of her disruptive behaviors occur in the classroom during academic instruction. She works at a very slow pace and needs frequent prompting to stay on-task. She does not like to be rushed and may shut down or have an angry outburst if she feels pressured. Although she is good at rote memorization, she has trouble retaining and applying information, and becomes frustrated with classwork that requires higher-level thinking. She has poor impulse control and displays behaviors that are disruptive to her own instruction and that of other students, such as pulling on the teacher's wrist, interrupting and demanding immediate attention, getting out of her seat and running around the room, grabbing things from other students, yelling, pulling hair, hitting and pinching students and teaching staff, inappropriately hugging others, talking out in class, and answering academic questions by talking about off-topic subjects. She sometimes talks or sings to herself while rocking her head from side to side, giggles for no apparent reason, or appears to be staring at something behind the adult speaking to her. At \*\*\*, she displayed similar behaviors in that she had trouble staying seated, was limited to certain tutors because she disliked others and would not work with them, and required frequent redirection.

8. HISD teachers and administrative staff implemented Student's BIP during \*\*\* and \*\*\* grades. The BIP provides a sequence of steps to be followed to address noncompliant, disruptive, and verbally or physically aggressive behaviors. The last step is placement in the Behavior Training Center (BTC): "If she does not calm down and inappropriate behaviors continue, the Behavior Training Center may be contacted for intervention and/or removal." Student's Alternative Discipline Plan provides as a consequence for aggressive behaviors: "If her behavior continues to escalate [to] the point school personnel is (*sic*) unable to manage the behavior then she will be removed to the BTC." Respondent's Exhibit (R.Ex.) 1.

9. The BTC is staffed by certified special education teachers and used as an alternative educational placement for special education students. The BTC has positive behavioral supports, students' individual BIPs are followed, and they work on assignments provided by and graded by their classroom teachers. During Fall 2005, Student twice attended BTC for a three-day period in a small classroom that has a special education teacher, an aide, and usually three or four students.

10. On October 13, 2005, Student was sent to the office for exposing herself in advisory period by lifting her shirt and unzipping her pants. On October 20, 2005, she was sent to the office for pinching and pushing a teacher. On October 21, 2005, she was sent to the office for hitting a student in the chest. Because of the latter two offenses, she was placed at the BTC pursuant to her BIP for three days, October 27—November 1, 2005. In late-November 2005, she became angry and pulled the hair of both a teacher and an aide. She was placed in the BTC for three more days as a result. Her parents were informed of the assignments to BTC by Mr. \*\*\*, \*\*\* assistant principal.

11. Ms. \*\*\* is Student's PE and advisory period teacher. Student's behavior is better in PE, where she can be physically active, than in the advisory period, where she must sit at a desk.

She sometimes annoys students in both classes by not respecting their personal space, touching them, or yelling at them. Ms. \*\*\* reviews the class rules with Student every day, and has assigned two “peer buddies” to help Student with PE activities, getting dressed, and using her gym locker. They notify Ms. \*\*\* if Student tries to leave the class boundaries and Ms. \*\*\* easily redirects her. Ms. \*\*\* does not need an aide for Student in her classes because she is managing well with the peer buddy system.

12. Student is able to pass through the halls independently to her \*\*\* school classes. She had some tardies during Fall 2005, but not to an unusual degree for a \*\*\*-grader. She sometimes runs in the hall but responds well to redirection. Her classes are close together and she knows their location and the location of her locker. Teachers on her campus stand outside their classrooms and monitor the hallway activity of all students between classes, and the locker room and lunchroom also are supervised by teachers. In addition, all students are supervised as soon as they get off the bus.

13. When Student was in \*\*\* grade, she was diagnosed with \*\*\* and attention deficit disorder (ADD). The ARDC met in February 2002 to add OHI to Student’s special education eligibility. At that meeting, her father requested that she be moved from the resource room to regular education and that all modifications be removed. She continued to have IEP goals and objectives but they were implemented in the regular \*\*\*-grade classroom.

14. In May 2002, when Student was \*\*\* years old, Dr. \*\*\*, licensed specialist in school psychology (LSSP), performed an independent educational evaluation requested by Student’s parents. Student’s full-scale IQ on the Wechsler Intelligence Scale for Children–III (WISC–III) was \*\*\*, in the mentally deficient range. However, Dr. \*\*\* cautioned that Student’s hyperactivity, distractibility, and slow pace of work during the evaluation affected her performance, and her IQ scores appeared to underestimate her academic ability as reflected on her achievement test scores. “At the same time, the results of IQ measures cannot be ignored. Results indicate that Student is at-risk for having problems in the future as academic materials become more complex and abstract. She has consistently displayed delays in her ability to process complex information.” \*\*\*, R-Ex. 15.

15. In July 2004, when Student was \*\*\* years old, Dr. \*\*\*, clinical psychologist, performed a psychological evaluation at the request of Student’s psychiatrist. Student demonstrates social immaturity both at school and home. On the Vineland Adaptive Behavior Scales, she received a Socialization score with an age-equivalence of \*\*\* years, \*\*\* months, and an Adaptive Behavior Composite of \*\*\* years, \*\*\* month. Student’s scores on the Woodcock-Johnson Tests of Achievement-III indicated she could read words at a grade equivalent of \*\*\*, but her reading comprehension score was at grade equivalent \*\*\*. Her rote calculation of simple math facts and her spelling were average for her age. Her academic scores ranged from \*\*\* through \*\*\* grade, with the exception of a Math Fluency subtest score of \*\*\*. Subtest scores for Story Recall, Understanding Directions, and Writing Fluency were at the \*\*\* level. Her overall cluster grade-equivalent scores were: Oral Language below \*\*\* level; Broad Reading \*\*\*; Broad Written Language \*\*\*; Math Calculation Skills \*\*\*; Written Expression \*\*\*; Academic Skills \*\*\*; Academic Fluency \*\*\*. \*\*\*, R.Ex. 6.

16. Student's full-scale IQ on the WISC-IV administered by Dr. \*\*\* was \*\*\*. "[T]he results of the cognitive testing most likely underestimate her overall potential. However, this evaluation does appear to provide a valid sample of the extent to which attentional and ideational factors are interfering with her current functioning." Dr. \*\*\* found that Student had severely deficient auditory comprehension and ability to follow directions, deficient adaptive behavior skills, difficulties with social interaction, and disorganized speech and thought processes that suggest a thought disorder. Dr. \*\*\* diagnosed Student with ADHD, childhood disintegrative disorder, and psychotic disorder not otherwise stated, as well as \*\*\* by report. \*\*\*, R.Ex. 6.

17. HISD performed a full individual evaluation (FIE) in September 2004 at the beginning of \*\*\* grade. \*\*\*, LSSP Trainee, administered the Woodcock-Johnson-III Tests of Cognitive Abilities, on which Student obtained a general intellectual ability score of \*\*\*. Due to Student's extreme resistance to testing and inappropriate behaviors, including threatening to hit the examiner, Ms. \*\*\* deferred to Dr. \*\*\*' evaluation with its full-scale IQ score of \*\*\*. She found Student to be significantly behind in all academic areas, but with achievement scores commensurate with or above her overall cognitive level. Her verbal scores were higher than her nonverbal scores. The FIE found that Student did not meet the Texas Education Agency criteria for emotional disturbance or speech impairment. \*\*\*, R.Ex. 5.

18. In September 2004, Student's \*\*\*-grade applied skills teacher, Ms. \*\*\*, gave her the Educational Performance Assessment (EPA) to determine her instructional level. She found Student to be a fast reader with good phonetic skills who could read on a beginning \*\*\*-grade level, \*\*\*. In language arts, Student was a beginning writer with skills ranging up to \*\*\*-grade level, a good speller, and able to write a sentence on her own with good sentence structure. In math, she was at a \*\*\*-grade level and had good addition and multiplication skills, but showed great difficulty throughout the year with math word problems. Student's math IEP was changed in December 2004 to add additional math goals at the \*\*\* and \*\*\*-grade level. When Student took the EPA again at the end of \*\*\* grade, her scores indicated educational progress: her reading instructional level had progressed to \*\*\* grade, second semester (\*\*\*), and her writing had improved to the intermediate level. In science and social studies, she had progressed from \*\*\*-grade to \*\*\*-grade level, and in math she had progressed to the \*\*\*-grade instructional level.

19. Ms. \*\*\* is Student's \*\*\*-grade resource teacher for reading and language arts, and has eight students in her class. In Fall 2005 she gave Student several diagnostic tests. Student was able to read/decode words at the \*\*\*-grade level, but reading comprehension was at the \*\*\*-grade level on both the Star and Gates-McGinitie reading tests. On the Test of Written Spelling she scored at the \*\*\*-grade level. On the Test of Written Language, her subtest scores ranged from \*\*\* grade to \*\*\* grade, with an overall skill level of \*\*\*-grade. She is instructed in Ms. \*\*\*'s class at the \*\*\*\_ \*\*\* grade-level. It is extremely difficult for her to read silently, even during tests. She has a good vocabulary. She can see a word and say it, spell it, or define it, but has great difficulty applying it in a sentence.

20. Ms. \*\*\* is Student's \*\*\*-grade resource math teacher, and has 11 students in her class. She gave Student the Saxon math inventory on August 16, 2005, and again on September 28, 2005. Both times, Student's scores indicated she should be instructed in math at the \*\*\*-grade level. Student is more proficient at computation than math problem-solving, and needs much

repetition of the same material because she does not retain it well.

21. Ms. \*\*\* is Student's \*\*\*-grade applied skills teacher for science and social studies, and also her campus special education case monitor. She has an aide in her classroom, and six to eight students in her science and social studies classes. Student needs much re-teaching, frequently on a daily basis, to retain basic concepts. Her work pace is very slow, as when she required a week to complete a science experiment that her classmates completed in one class period. She had to be physically blocked from an open flame on a Bunsen burner to prevent her from touching it. Her instructional level in science and social studies is low \*\*\* grade to \*\*\* grade. At parental request, Ms. \*\*\* temporarily tried to teach Student using the regular \*\*\*-grade curriculum, with the classroom aide instructing her one-on-one. Student did not comprehend most of the material. She performs better when she is taught at her own instructional level and able to participate with the rest of her class in small-group instruction.

22. Dr. \*\*\* is an LSSP and college professor who consults with HISD and with other school districts and parents on special education evaluations. She reviewed Student's special education file, including previous evaluations, medical records, and behavior records, and spoke with Student's teachers about her classroom performance. She testified as Respondent's expert at the hearing.

23. \*\*\* is a chromosomal disorder in \*\*\* that causes developmental delays. \*\*\* causes impairments in three areas: 1) cognitive functioning, including difficulties with memory and attention; 2) executive functioning, including the ability to inhibit impulses, regulate behavior and emotions, self-monitor, plan, concentrate, organize, and perform multi-step problem-solving; and 3) social functioning, which can lead to extreme social immaturity and an impaired ability to process social cues from others and behave accordingly. \*\*\*, Tr. 440-443.

24. As children with developmental delays get older, their test scores tend to drop as the test questions increase in difficulty to reflect the increasing chronological age of the population being tested. This appears to have happened to Student's scores on the Woodcock-Johnson-III Tests of Achievement, which she took in 2002 and again in 2004. Her Passage Comprehension score was \*\*\* in 2002, but dropped to \*\*\* in 2004. \*\*\*, Tr. 479-482; R.Ex. 6 and 15.

25. Student's cognitive scores are significantly below average because she has numerous language and verbal-information processing deficits, which include limited working memory, visuo-spatial thinking, visual-motor integration, attention, auditory processing, and processing speed. Student performs better on short-term memory testing, which requires repeating a list of words, than on working memory testing, which requires retaining information and applying it or transforming it. She has a strength in word-decoding, but very poor reading comprehension skills. Her problems with processing information have become more pronounced as she has progressed into higher grades and academic demands have become more complex and abstract. She has difficulty both in comprehending material and in retaining material previously learned. "[B]ecause she has impairments in multiple processes, learning in general will be very difficult for her . . . testing done by Dr. \*\*\*, by HISD, by Dr. \*\*\* is very consistent in showing that Student has cognitive-processing problems and that, because of those problems, she will have trouble learning, which is what all of the evaluators said." \*\*\*, Tr. 449; 475.

26. Even with an aide or co-teacher, a regular \*\*\*-grade classroom would be "overwhelming" for Student. Regular \*\*\* grade requires self-monitoring, inhibition of behavior, independent work, and complex problem-solving. Student needs a structured classroom with opportunity for repetition and re-teaching of basic concepts; slower instructional pace; small student-to-teacher ratio; concrete examples, especially for abstract tasks; modified curriculum; and an environment with minimal distractions. Having an aide would not address her problems with working memory, behavioral inhibition, and distractibility, which were an obstacle even during her evaluations when she was tested one-on-one in a quiet room and receiving large amounts of redirection. "[F]irst and foremost, she would not be able to comprehend at that level . . . The one thing we know, for example, about working memory, is that the more you tax the system, the less able you are to engage in complex reasoning or problem-solving. And so I think you'd be placing her at a disadvantage, because she wouldn't be able to take in all this information . . . I think that placing Student in a general education class would lead to some escalation in her behaviors; would make her less likely to do well in the class and make progress." \*\*\* , Tr. 465-66; 474.

27. Dr. \*\*\* is a child and adolescent psychiatrist and college professor who prescribes and monitors medications for Student. He testified as Petitioner's expert witness at hearing. Student takes Risperdal, an antipsychotic medication, and Lexapro, an antidepressant. Student has hallucinosis and disjointed communication, which may indicate she has childhood schizophrenia in addition to \*\*\*. She at times becomes distracted by internal stimulation that is not reality-based, as opposed to distraction caused by attention deficit. \*\*\* , Tr. 128,135.

28. The State-Developed Alternative Assessment (SDAA) is a modified test administered to students for whom the ARDC has determined that the regular statewide assessment instrument, the TAKS, is inappropriate because of their low academic functioning level. The SDAA has fewer and less-difficult questions than the TAKS. Student passed the Math SDAA in 2005 with a score of \*\*\*. She passed the Reading SDAA in 2005 with a score of \*\*\*.

29. Student has attended \*\*\* for academic tutoring since summer 2005. On a reading test given by \*\*\*staff, Student scored at the \*\*\*-grade level, but the testing was an untimed administration of the California Achievement Test/5 (CAT/5), which was normed in approximately 1992 and was replaced by the CAT/6 in approximately 2000. Achievement tests are re-normed periodically because the test becomes easier as time passes due to the population becoming more familiar with test information. The Cat/5 is designed to be administered according to a standardized procedure with subtests completed within a specified time, but Student was given unlimited time to finish. Therefore, her test scores on the Cat/5 cannot reliably be compared to those of the group used to the norm the test.

30. At least one of Student's parents has attended all ARDC meetings at HISD, either in person or by telephone, except for one or more occasions where the parents gave consent for the meetings to take place without their presence. Student's IEPs and BIP for \*\*\* grade were developed at her annual ARDC meeting on April 8, 2005, and subsequent ARDC meetings on May 5 and May 26, 2005. The parents reluctantly agreed to academic instruction in resource and adaptive skills classrooms, but stated their preference for a regular education co-teach classroom,

with co-teaching by a regular education teacher and a special education teacher.

31. At parent request, an ARDC meeting was held on August 12, 2005, to again discuss their request for a co-teach placement. The meeting ended in disagreement and was recessed and reconvened on September 12, 2005. In that meeting, the parents continued to request a co-teach class and to disagree with the current placement. The parents filed their request for due process hearing on September 13, 2005.

## **DISCUSSION**

### **Background**

Student is a \*\*\*-grade girl who receives special education as a student with OHI due to \*\*\* and ADHD. In addition, her psychiatrist believes she displays psychotic features, and a clinical psychologist diagnosed her with childhood disintegrative disorder and an unspecified psychotic disorder. At the time of the hearing she was \*\*\* years old. She receives reading, language arts, and math instruction in a resource class, and science and social studies instruction in an applied skills class. The applied skills class focuses on academics rather than life skills or adaptive behavior, although Student does have a BIP and a detailed social skills IEP. Both the resource class and the applied skills class are structured special education settings that provide a small student-to-teacher ratio, opportunities for one-on-one and small-group instruction, and minimal distractions compared to a regular education \*\*\*-grade class. Student is included in regular education for advisory period, choir, physical education, and lunch.

Student's parents want her to receive academic instruction in regular education \*\*\*-grade classes with the assistance of a co-teacher and/or instructional aide. They disagree with the district's assessment of Student's academic level and abilities, and believe her IEP goals are targeted to an inappropriately low ability level.

### **Educational Benefit**

An appropriate placement under IDEA is one that enables a student to obtain "some benefit" from her education. The law does not require that a student's educational potential be optimal or "maximized." *Hendrick Hudson District Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). Schools are not required to provide all services from which a child might benefit. Instead, the district must provide personalized instruction with sufficient support services to permit the student to receive an "educational benefit," i.e., a program that is meaningful and is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Rowley, id.*; *Houston ISD v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000); *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir. 1997).

As recently affirmed by the U.S. Supreme Court, a Petitioner seeking relief through a special education due process hearing has the legal burden of proving that the placement recommended by the ARDC is not appropriate. *Schaffer v. Weast*, 156 S.Ct. 528, 44 IDELR 150 (2005). Petitioner did not meet that burden in this case.

Student has \*\*\*. The evidence established that \*\*\* is a genetic disorder that can cause impairments in three areas critical to learning: 1) cognitive functioning, including difficulties with memory and attention; 2) executive functioning, including the ability to inhibit impulses, regulate behavior and emotions, self-monitor, plan, concentrate, organize, and perform multi-

step problem-solving; and 3) social functioning, which can lead to extreme social immaturity and an impaired ability to process social cues from others and behave according to social norms. Student's evaluation data and the testimony of her teachers and parents confirm that she has significant deficits in all three areas, resulting in a serious detrimental impact on her education.

Several evaluators have advised that Student's low cognitive scores must be viewed with caution due to the difficulties in testing caused by her impulsivity and attention problems. However, the common denominator in the various evaluations is that they consistently indicate processing deficits that impair Student's ability to learn, which is confirmed by her below-grade-level achievement test scores and classroom performance. Student's testing shows processing deficits in numerous areas, including working memory, auditory processing, and processing speed. She has particular trouble processing information that is complex and abstract, which has become more problematic as she has progressed into higher grades. She performs at or near grade-level in spelling, reading a list of words, and basic math facts, but has significant delays in reading comprehension, which her current reading teacher estimates to be at a \*\*\*-grade level. The low reading comprehension affects her performance in all academic subjects, including math, where she can perform basic computations but has extreme difficulty applying them to word problems. Further, she has trouble retaining information previously learned, and needs much repetition and reteaching of basic concepts. In addition, Student displays very significant difficulties with social skills, peer and adult relationships at school, and disruptive behaviors such as running around the room, talking during instruction time, arguing with teaching staff, and physical aggression toward staff and students.

Petitioner argued that the IEP goals and objectives recommended by the ARD committee were set below Student's academic abilities, but the record does not bear this out. IDEA requires that a student's IEPs be individualized based on assessment and performance. 34 C.F.R. §300.346. Testimony by teachers and evaluation data from multiple sources established that Student's IEP goals and objectives are appropriate. The fact that she is strong in phonetics and decoding words and passed reading at a \*\*\*-grade level on the SDAA does not outweigh numerous other indications that her reading comprehension is approximately the \*\*\*-grade level. The SDAA is a modified, simplified test which she took because the ARDC determined that she would not pass the TAKS due to her disabilities. In fact, her current reading teacher believes that she should take the alternative assessment at a lower level this year based on classroom assessments and performance. Tests from \*\*\* which indicated a higher reading level are not persuasive. The \*\*\* tests were based on an outdated testing instrument that was replaced by the testing company several years ago. Student was allowed more than double the time allotted for the timed subtests, which violated testing procedures and renders suspect any comparison to the population for which the test was normed.

### **Placement in the Least Restrictive Environment Appropriate**

Student is entitled to be educated with her nondisabled peers to the maximum extent appropriate. *Daniel R.R. v. State Board of Educ.*, 874 F.2d 1036 (5<sup>th</sup> Cir. 1989). A two-part inquiry must be made: First, whether education in the regular classroom, with supplementary aids and services, can be achieved satisfactorily, and, if not, whether the school has included the child in regular education to the maximum extent appropriate. In *Daniel R.R.*, the Fifth Circuit discussed the factors for determining the appropriate level of inclusion, including academic and nonacademic benefits for the child with a disability, detrimental effects of inclusion on the child with a disability, and detrimental effects on classmates. An individualized examination must be

made of the nature and severity of the child's disability, her needs and abilities, and the school's response to her needs, including whether the school has taken steps to accommodate her in regular education.

HISD tried without success to accommodate Student in regular education in earlier grades. At parental request, she was placed in a regular education classroom for \*\*\* grade, but she exhibited serious academic and behavioral problems in that setting. Her parents withdrew her from HISD at the beginning of \*\*\* grade when the district tried to convene an ARDC meeting to consider placement in a special education classroom. She was transferred to Houston ISD, where she continued to display aggressive behaviors and was placed in a self-contained special education setting. She returned to HISD at the beginning of \*\*\* grade and was placed in a special education applied skills classroom for all academic subjects, where she was successful and mastered almost all of her goals and objectives. Her current placement in \*\*\* grade is less restrictive than last year because she now takes several academic subjects in the resource classroom, which is less restrictive than the applied skills classroom.

Dr. \*\*\* is Student's treating psychiatrist and prescribes her medications. He saw her three times in 2005. He recommended a one-on-one aide. Numerous witnesses testified persuasively that an aide and/or co-teacher would not allow Student to be successful in a regular \*\*\*-grade class because the aide could not compensate for her inability to comprehend \*\*\*-grade material, retain and apply complex information, and cope with fast-paced instruction. Dr. \*\*\*, Respondent's expert witness, testified that such a situation would be overwhelming to Student and would likely cause her disruptive behaviors to escalate.

Because Dr. \*\*\* has never observed Student at school, spoken to her teachers, or reviewed her academic testing, his opinions concerning her educational programming carry less weight than those of district staff who work with her every day. While the ARDC must consider all outside evaluations and data provided by the parents, it is not required to adopt their recommendations. The committee is entitled to rely on input from its own evaluators and staff, and to reach its own judgment regarding the provision of a FAPE, even when outside experts have different opinions. This is true even when a district has requested and/or paid for outside evaluations. See, *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 17 EHLR 990 (5<sup>th</sup> Cir. 1991), declining to create a presumption in favor of the testimony of the child's treating physician. The Fifth Circuit noted that the input of school staff was based on "daily and continuing observation within the classroom . . . Christopher's physician, by contrast, saw him only infrequently and for short periods of time, nor did he regularly observe the actual effects of the educational program on Christopher." *Id.* The Fifth Circuit again emphasized the importance of the opinions of school staff in *Cypress-Fairbanks, id.*

The district is not required to provide every conceivable supplementary aid and service to assist the child, to modify the curriculum beyond recognition, or to provide a "classroom within a classroom" for a student. *Daniel R.R., id.* On the contrary, it is required by IDEA to provide a continuum of services, including one-on-one instruction or small-group instruction for students whose disabilities make that appropriate. 34 C.F.R. §300.551. The evidence indicates that Student needs an academic curriculum so drastically modified as to be unrecognizable as a regular \*\*\*-grade curriculum, and that placement in regular \*\*\*-grade, even with an aide and a special education co-teacher, would be highly distracting to her, detrimental to her ability to learn, and disruptive to the education of other students. *Daniel R.R., id; Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7<sup>th</sup> Cir.1988), *cert. denied*, 488 U.S. 925 (1988).

## **Behavior Intervention Plan**

Petitioner argued that HISD retaliated against the family for filing for due process by fabricating evidence of behavioral problems after the request was filed. On the contrary, the record reveals that Student demonstrated disruptive classroom behavior beginning in the early elementary grades, and continuing throughout her academic career both at Houston ISD and HISD. The vast majority of Student's disruptive behaviors occur during academic instruction, and appear to stem, at least in part, from her frustration with coursework that taxes her cognitive abilities and requires her to sit still.

Petitioner did not prove that Student's BIP was inappropriate or not fully implemented. The BIP allows for placement in the BTC, a short-term discipline classroom staffed by certified special education teachers, as a last resort for problem behavior. Student was assigned to BTC for two three-day periods during Fall 2005, once after she pinched and pushed a teacher one day and hit a student the next day, and once for pulling the hair of a teacher and the classroom aide. These assignments did not constitute a change of placement under the IDEA and did not trigger a requirement for a manifestation determination meeting. However, if Student's aggressive behaviors continue to trigger BTC placements, the ARDC may need to reconsider whether a one-on-one aide is appropriate for behavior control in the classroom.

At the \*\*\* school Student has been able to pass independently from class to class in a hallway closely monitored by teachers, and she functions adequately in PE with peer buddies assigned by the teacher. A preponderance of the evidence indicates that Student does not need an aide for PE or the hallway at this time.

## **Conclusion**

Student's parents are devoted to her and want only the best for her. They have a legal right to meaningful input and involvement in her education, and they have exercised that right at numerous ARDC meetings and other contacts with the school. However, parents do not have a right to dictate educational methodology or the details of the educational program. *Cypress-Fairbanks, id.*; *White v. Ascension Parish Sch. Bd.* 343, F.3d 373 (5<sup>th</sup> Cir. 2003); *Lachman, id.*

The district must provide instruction that is tailored to Student's unique needs, and has done so in this case. Student needs specialized small-group instruction at her academic level to make reasonable educational progress, as demonstrated by testimony from school staff, the FIE, and independent evaluations. She needs a low teacher-student ratio, drastically modified curriculum, slow instructional pace, intensive and repetitive instruction, and behavioral interventions to keep her on task and learning. Placement in regular education would be detrimental to her own education and that of other students, even with a co-teacher and an aide.

Student's IEPs are individualized on the basis of her assessment and performance; she received an educational benefit in the least restrictive environment; her services were provided in a coordinated and collaborative manner by the key stakeholders; and she made progress both academically and non-academically. HISD has provided Student a FAPE. *Cypress-Fairbanks, id.*; *Rowley, id.*

## **CONCLUSIONS OF LAW**

1. Student resides in HISD, a legally constituted independent school district within the

State of Texas, and is entitled to special education services pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, et seq., as amended. Student is eligible for special education as a student with OHI. *Hendrick Hudson District Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

2. As the party challenging the educational program proposed by the district, Petitioner bears the burden of proof. Petitioner did not demonstrate that HISD failed to provide Student with appropriate IEP goals and objectives, an appropriate behavior intervention plan, and instruction delivered in the least restrictive environment appropriate and tailored to her individual needs and abilities. *Schaffer v. Weast*, 156 S.Ct. 528, 44 IDELR 150 (2005); *Rowley, id.*;

3. Student's IEPs are tailored to her academic level and are reasonably calculated to provide an educational benefit. Her educational services were provided in a coordinated and collaborative manner by the key stakeholders; her IEPs are individualized on the basis of her assessment and performance; she received an educational benefit in the least restrictive environment; and she made progress both academically and non-academically. HISD has provided Student a free appropriate public education. *Rowley, id.*; *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

4. Petitioner did not demonstrate that the assistance of a special education co-teacher and/or instructional aide would adequately address Student's cognitive and attention deficits, below-grade-level functioning in academics and social skills, and off-task, disruptive behaviors so as to allow her to be successful in a regular \*\*\*-grade classroom. Student's reading comprehension level is approximately \*\*\*-grade and affects her learning in all academic subjects. Even with a one-on-one aide, the \*\*\*-grade curriculum would be inappropriately difficult for her and would have to be modified beyond recognition. In addition, she would be highly distracted in a large classroom and prone to behavior disruptive to her own education and that of other students. *Daniel R.R. v. State Board of Educ.*, 874 F.2d 1036 (5<sup>th</sup> Cir. 1989); *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7<sup>th</sup> Cir.1988), *cert. denied*, 488 U.S. 925 (1988).

5. Due to the nature and severity of her disability, Student requires specialized instruction targeted to her academic level in a structured, small-group setting with minimal distractions and a small student-to-staff ratio, and with the opportunity for frequent repetition, re-teaching, and redirection. She made academic progress in her \*\*\*-grade applied skills class, and her \*\*\*-grade placement in special education resource and applied skills classes for academic subjects, with inclusion in regular education choir, PE, and lunch, as well as a behavior intervention plan, provides education in the least restrictive environment appropriate at this time. *Daniel R.R., id.*; *Lachman, id.*

6. Student does not demonstrate a need for an aide in PE or in the hallway at this time. Moving around the building independently is a strength for Student, and her IEP and schedule of services do not require an aide for this purpose. She functions independently in her PE class with some extra attention from her teacher and the assistance of peer buddies, passes independently from class to class in a hallway that is closely monitored by teachers, and uses a locker in a supervised locker room. *Daniel R.R., id.*

7. Petitioner did not demonstrate that Student's BIP was inappropriate or not implemented, or that her short-term assignments to the Behavioral Training Center pursuant to the BIP were inappropriate or constituted a change in placement requiring a manifestation determination. *Schaffer, id.*

8. No presumption exists in favor of the testimony of the student's treating physician. Petitioner did not prove that in determining Student's educational programming, the district erred in relying on its own formal and informal assessment data, independent psychological evaluations and consultations, and staff observations of academic and behavioral performance. *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 17 EHLR 990 (5<sup>th</sup> Cir. 1991); *Cypress-Fairbanks, id.*

### **ORDER**

Based upon a preponderance of the evidence and the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the relief requested by Petitioner is **DENIED**.

**SIGNED** this 17th day of January, 2006.

*Janis Herd* \_\_\_\_\_

Janis Herd  
Special Education Hearing Officer

**DOCKET NO. 001-SE-0905**

<b>Student, b/n/f Parents, Petitioner</b>	§	<b>BEFORE A SPECIAL EDUCATION</b>
	§	
	§	
<b>v.</b>	§	<b>HEARING OFFICER</b>
	§	
<b>HUMBLE INDEPENDENT SCHOOL DISTRICT, Respondent</b>	§	<b>FOR THE STATE OF TEXAS</b>

**SYNOPSIS**

**Issue 1:** Has HISD offered Student an appropriate educational program in the least restrictive environment appropriate?

**Held:** For Respondent. Due to the nature and severity of her disability, Student requires specialized instruction targeted to her academic level in a structured, small-group setting with minimal distractions and a small student-to-staff ratio, and with the opportunity for frequent repetition, re-teaching, and redirection. She made academic progress in her \*\*\*-grade applied skills class, and her \*\*\*-grade placement in special education resource and applied skills classes for academic subjects, with inclusion in regular education choir, PE, and lunch, as well as a behavior intervention plan, provides education in the least restrictive environment appropriate at this time.

**Citation:** 34 C.F.R. §§300.550 -- 300.551.

**Issue 2:** Should Student be provided a one-on-one aide and/or a co-teach placement in a regular \*\*\*-grade classroom?

**Held:** For Respondent. Petitioner did not demonstrate that the assistance of a special education co-teacher and/or instructional aide would adequately address Student's cognitive and attention deficits, below-grade-level functioning in academics and social skills, and off-task, disruptive behaviors so as to allow her to be successful in a regular \*\*\*-grade classroom. Student's reading comprehension level is approximately \*\*\*-grade and affects her learning in all academic subjects. Even with a one-on-one aide, the \*\*\*-grade curriculum would be inappropriately difficult for her and would have to be modified beyond recognition. In addition, she would be highly distracted in a large classroom and prone to behavior disruptive to her own education and that of other students.

**Citation:** 34 C.F.R. §§300.550 -- 300.551.

**Issue 3:** Should Student be provided an aide for the hallway and for PE?

**Held:** For Respondent. Student does not demonstrate a need for an aide in PE or in the hallway at this time. Moving around the building independently is a strength for

Student, and her IEP and schedule of services do not require an aide for this purpose. She functions independently in her PE class with some extra attention from her teacher and the assistance of peer buddies, passes independently from class to class in a hallway that is closely monitored by teachers, and uses a locker in a supervised locker room.

**Citation:** 34 C.F.R. §§300.550 -- 300.551.

**Issue 4:** Has HISD offered Student a FAPE, including appropriate IEPs with goals and objectives tailored to her educational needs and abilities?

**Held:** For Respondent. Student's IEPs are tailored to her academic level and are reasonably calculated to provide an educational benefit. Her educational services were provided in a coordinated and collaborative manner by the key stakeholders; her IEPs are individualized on the basis of her assessment and performance; she received an educational benefit in the least restrictive environment; and she made progress both academically and non-academically. HISD has provided Student a free appropriate public education.

**Citation:** 34 C.F.R. §§300.300, 300.346.

**Issue 5:** Has HISD provided and implemented an appropriate behavior intervention plan (BIP)?

**Held:** For Respondent. Petitioner did not demonstrate that Student's BIP was inappropriate or not implemented, or that her short-term assignments to the Behavioral Training Center pursuant to the BIP were inappropriate or constituted a change in placement requiring a manifestation determination.

**Citation:** 34 C.F.R. §§300.520